

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ERICK MARTINEZ,

Petitioner,

v.

HOREL,

Respondent.

No. CV 07-2051-PA (PLA)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Amended Petition for Writ of Habeas Corpus be dismissed with prejudice.

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I.

SUMMARY OF PROCEEDINGS

A Los Angeles County Superior Court jury convicted petitioner on May 25, 2004, of one count of attempted willful, deliberate, premeditated murder (Cal. Penal Code §§ 187(a), 189, 664), one count of assault with a firearm (Cal. Penal Code § 245(a)(2)), and one count of shooting at an occupied motor vehicle (Cal. Penal Code § 246). The jury found true firearm allegations within the meaning of California Penal Code §§ 12022.53(b) and (c). (Reporter's Transcript ("RT") 408, 411-15; Clerk's Transcript ("CT") 146-49, 152-54, 159-61). The trial court imposed a sentence of life with the possibility of parole, plus twenty years. (RT 419-23; CT 156-57, 159-61).

Petitioner appealed, and the California Court of Appeal affirmed the conviction in a reasoned opinion. (See Lodgment Nos. 1, 4). Petitioner subsequently filed a petition for review, which the California Supreme Court denied without comment on February 22, 2006. (See Lodgment Nos. 5, 7).

Petitioner filed a Petition in this Court on March 28, 2007. On April 18, 2007, petitioner filed an Amended Petition ("Am. Pet."), which is the operative pleading. Respondent filed an Answer and Return on September 5, 2007. On March 31, 2008, the Court received a letter from petitioner which is construed as his Reply.

This matter has been taken under submission, and is now ready for decision.

II.

STATEMENT OF FACTS**A. Prosecution Evidence**

On July 15, 2003, at approximately 6:00 p.m., petitioner was with Corina Capehart and Parris Mendez at "Joe's Place," a bar located on Fernando Mission Boulevard and Woodley in the San Fernando Valley. Petitioner was drinking and smoking. Because the people sitting near him did not want him to smoke, petitioner moved to the table where Mendez was sitting. Theresa Hacker arrived at the bar and walked up to the table where petitioner and Mendez were sitting. Hacker and petitioner got into an argument. Mendez asked petitioner to "cool it." Petitioner told

1 Mendez, "shut the fuck up or you'll be wearing this pitcher." (RT 59-61, 104, 107-09, 165-66).
2 Mendez threw a pitcher of beer on petitioner. Petitioner made a derogatory comment to Hacker,
3 and she attempted to slap him. Petitioner blocked the slap. (RT 63-64, 81-82, 87, 151, 155-56,
4 167). Petitioner looked at Mendez and said, "you'll be sorry" and left the bar. (RT 65, 112).

5 Glenn Daniel (who is nicknamed "Bubba") saw that petitioner had left his sunglasses and
6 went out to the parking lot to return them. Daniel saw petitioner and placed the sunglasses on
7 the hood of petitioner's truck. Petitioner did not say anything. As Daniel turned to walk back into
8 the bar, he heard a crash. Daniel turned around and saw petitioner breaking the back window of
9 a pickup truck with a car club. Petitioner got into his truck and said, "I'll be back." (RT 90-93).
10 Daniel had no difficulty understanding petitioner's speech. (RT 96). According to Daniel,
11 petitioner "[s]eemed to be upright and walked fine." (RT 96).

12 Daniel came into the bar and told the owner what had occurred and asked the owner to call
13 the police. (RT 97). Several people went out to the parking lot, including Corina Capehart and
14 Parris Mendez. (RT 65-66, 112). Three windows in Mendez's pickup truck were broken. (RT
15 112, 115).

16 Petitioner then returned to the parking lot. (RT 71-73, 77, 117-19, 156). Mendez was
17 afraid, and got into his truck and left. Capehart returned to the bar. (RT 74-75, 77, 83, 119).

18 Petitioner then got into his truck and followed Mendez. Mendez was driving toward the
19 police station to report the incident. (RT 122-24). As Mendez approached a traffic light, petitioner
20 pulled up to the driver's side of Mendez's truck and started shouting. Petitioner was revving his
21 motor. Mendez turned his head forward and heard three or four gunshots. Mendez ducked down,
22 pulled his truck around another parked car, and proceeded through the red light. Mendez was
23 relieved that petitioner did not follow him, but noticed that his face was bleeding. (RT 125-27).
24 Mendez turned into a grocery store parking lot and asked the security guard to call 9-1-1. (RT
25 128).

26 Paramedics arrived and Mendez was transported to the hospital. (RT 128). Mendez had
27 bullet fragments and lacerations on his face. One bullet fragment was removed from his neck,
28 requiring three stitches. (RT 129-30).

1 There were four bullet holes in Mendez's truck, and two bullets were recovered from inside
2 the truck. (RT 131-34, 137).

3 Investigating officer Orlando Martinez arrested petitioner. (RT 171-72). During a search
4 of petitioner's truck, the following was recovered: a semiautomatic nine-millimeter handgun, a
5 nine-millimeter magazine, and thirteen nine-millimeter rounds of ammunition. (RT 174-79, 187,
6 203). Additional boxes of ammunition were recovered from inside the residence where petitioner
7 was arrested. (RT 182). Ballistics testing showed that one of the bullets recovered from inside
8 Mendez's truck was fired from the handgun recovered from petitioner's truck. (RT 139-43, 214,
9 229).

10 **B. Defense Evidence**

11 Petitioner testified in his own defense.

12 On July 15, 2003, petitioner arrived at Joe's Place at 9:00 a.m. He drank at least a pitcher
13 of beer an hour until around 5:00 p.m. He also drank "a couple [of] shots" that he purchased at
14 a nearby liquor store. By 5:00 p.m., he was "pretty" intoxicated. (RT 235-39).

15 Petitioner and Mendez used to drink together. Mendez was at the bar that evening when
16 Hacker walked in. Petitioner was playing pool. Hacker sat in petitioner's seat, and he asked her
17 to move. After Hacker ignored him, petitioner asked Hacker to move again, adding that he wanted
18 to get to his pitcher of beer. (RT 240-43). Because Hacker did not move, petitioner told her to
19 "Get the hell off the seat." Hacker got up and walked away, but turned and called petitioner an
20 "asshole." Petitioner took a "swig" of his beer. Mendez told petitioner that he was mean and
21 should have let Hacker remain in the seat. Petitioner stated: "Fuck that bitch." (RT 244). Hacker
22 turned around and tried to slap petitioner, but petitioner caught her wrist. Hacker then tried to slap
23 petitioner with her other hand, but petitioner grabbed that wrist as well. Petitioner let go of Hacker
24 and she backed off. Mendez called petitioner an "idiot" and petitioner asked Mendez, "Parry, are
25 you really going to take her side after you've known me a lot longer than you've known her just
26 because you think you're going to get laid or something?" Petitioner turned around and felt
27 something hit him in the side of the head. (RT 245). Petitioner felt pain and had beer in his eyes.
28 He started screaming at Mendez. Mendez started slapping petitioner and tried to hit him with a

1 pitcher. The bar owner got between petitioner and Mendez and told them they needed to leave.
2 Petitioner left the bar, but returned to get his keys from the bartender and then left a second time.
3 (RT 246-47).

4 After he was outside, petitioner realized that he had been cut during the altercation.
5 Petitioner became "really angry" because he was bleeding. Petitioner took the club from his car
6 and broke the window of Mendez's car. Daniel had come out to the parking lot and placed
7 petitioner's sunglasses on his car. Petitioner took his sunglasses and drove off. (RT 247-48).

8 Petitioner did not go home, but went to the grocery store around the corner to treat his
9 injury. About ten minutes later, because he could not find parking at the grocery store, he
10 returned to Joe's Place to get Mendez's license plate number. (RT 250). Petitioner parked at a
11 distance, but was unable to see the plate number. When Mendez drove off, petitioner followed
12 him in an attempt to read the plate. After seeing the number, petitioner needed to go in the same
13 direction as Mendez was driving. As petitioner passed Mendez, Mendez swerved his truck into
14 petitioner's truck. Petitioner swerved into oncoming traffic, and Mendez drove away. (RT 251-52).

15 Petitioner continued driving in the same direction and passed Mendez. Petitioner heard
16 someone say, "I'll kill you." He looked over and saw Mendez close to his car waving a gun.
17 Petitioner had a gun registered in his name which he kept in his truck. Petitioner explained that
18 he worked the graveyard shift at his job, and his work is "very secluded" so he kept the gun in his
19 car for protection. The gun was in petitioner's backpack. (RT 252, 259-60). Petitioner picked up
20 his gun and fired four shots. (RT 261, 283). Petitioner continued driving and saw Mendez in his
21 rearview mirror. Mendez drove off and petitioner drove to a friend's house. (RT 262-63).

22 23 III.

24 **PETITIONER'S CONTENTIONS**

25 1. "The attempted murder charge should be dropped to self-defense or attempted
26 involuntary [manslaughter]" because there was insufficient evidence to show that petitioner had,
27 or was capable of forming, the specific intent to kill the victim. (Am. Pet., Attachment of Grounds,
28 Appellant's Opening Brief (attached to Petition) ("Op. Brief") at 12-19).

2. The trial court improperly limited petitioner's testimony. (Am. Pet., Attachment of Grounds, Op. Brief at 20-27).

3. Petitioner's rights to an impartial jury and to due process were violated. (Am. Pet., Attachment of Grounds, Op. Brief at 28-35).

4. Petitioner's trial counsel was ineffective. (Am. Pet., Attachment of Grounds, Op. Brief at 36-40).

5. The trial court erroneously instructed the jury with CALJIC No. 5.55. (Am. Pet., Attachment of Grounds, Op. Brief at 41-52).

IV.

STANDARD OF REVIEW

The Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996). Therefore, the Court applies the AEDPA in its review of this action. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).

Under the AEDPA, a federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As explained by the Supreme Court, section 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In Williams, the Court held that:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case

1 differently than this Court has on a set of materially indistinguishable
 2 facts. Under the "unreasonable application" clause, a federal habeas
 3 court may grant the writ if the state court identifies the correct
 governing legal principle from this Court's decisions but unreasonably
 applies that principle to the facts of the prisoner's case.

4 Williams, 529 U.S. at 412-13; see Weighall v. Middle, 215 F.3d 1058, 1061-62 (9th Cir. 2000)
 5 (discussing Williams). A federal court making the "unreasonable application" inquiry asks
 6 "whether the state court's application of clearly established federal law was objectively
 7 unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. The Court explained that
 8 "a federal habeas court may not issue the writ simply because that court concludes in its
 9 independent judgment that the relevant state-court decision applied clearly established federal
 10 law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams,
 11 529 U.S. at 411; accord: Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144
 12 (2003). Section 2254(d)(1) imposes a "highly deferential standard for evaluating state-court
 13 rulings," Lindh, 521 U.S. at 333 n. 7, and "demands that state court decisions be given the benefit
 14 of the doubt." Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002)
 15 (per curiam). A federal court may not "substitut[e] its own judgment for that of the state court, in
 16 contravention of 28 U.S.C. § 2254(d)." Id.; Early v. Packer, 537 U.S. 3, 123 S.Ct. 362, 366, 154
 17 L.Ed.2d 263 (2002) (per curiam) (holding that habeas relief is not proper where state court
 18 decision was only "merely erroneous").

19 The only definitive source of clearly established federal law under the AEDPA is the
 20 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision.
 21 Williams, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of
 22 determining whether a state court decision is an unreasonable application of Supreme Court law
 23 (Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)), only the Supreme Court's holdings
 24 are binding on the state courts and only those holdings need be reasonably applied. Williams,
 25 529 U.S. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003), cert. denied, 540 U.S. 968
 26 (2003). Furthermore, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall
 27 be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing
 28 evidence."

1 The United States Supreme Court has held that “[w]here there has been one reasoned
 2 state judgment rejecting a federal claim, later unexplained orders upholding the judgment or
 3 rejecting the same claim rest upon the same ground.” Ylst v. Nunnemaker, 501 U.S. 797, 803,
 4 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Here, the California Court of Appeal issued an
 5 unpublished opinion rejecting all of the grounds for relief that are presented in the instant
 6 Amended Petition. See People v. Martinez, 2005 WL 2995528 (Cal. App. 2 Dist. Nov. 9, 2005).
 7 Without comment or citation to authority, the California Supreme Court denied review of the Court
 8 of Appeal’s decision. In these circumstances, a district court “looks through” the unexplained
 9 California Supreme Court decision to the last reasoned decision as the basis for the state court’s
 10 judgment. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (citing Ylst, 501 U.S.
 11 at 803-04). Accordingly, this Court reviews the appellate court’s opinion under the AEDPA
 12 standards. See Ylst, 501 U.S. at 803.

13 14 V.

15 DISCUSSION

16 **GROUND ONE: “THE ATTEMPTED MURDER CHARGE SHOULD BE DROPPED TO**
 17 **SELF-DEFENSE OR ATTEMPTED INVOLUNTARY [MANSLAUGHTER]”**
 18 **BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT**
PETITIONER HAD, OR WAS CAPABLE OF FORMING, THE SPECIFIC
INTENT TO KILL THE VICTIM.

19 Petitioner argues in Ground One that the attempted murder charge “should be dropped
 20 to self-defense or attempted involuntary [manslaughter]” because “[i]f it cannot be proven a gun
 21 was pointed at [him], the fact that all the witness[es] testified [he] had been drinking alcohol has
 22 to be acknowledged.” (Am. Pet., Attachment of Grounds). Thus, according to petitioner, the
 23 evidence was insufficient to prove attempted murder because he either acted in self-defense, or
 24 because his intoxicated mental state rendered him incapable of forming the specific intent to kill
 25 the victim. (Op. Brief at 12-19).

26 **A. Relevant California Law**

27 Under California law, murder is the unlawful killing of a human being with malice
 28 aforethought. (Cal. Penal Code § 187(a)). A murder is of the first degree if it is perpetrated by

any kind of willful, deliberate, and premeditated killing with express malice aforethought. (Cal. Penal Code § 189). "‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance." People v. Koontz, 27 Cal.4th 1041, 1080, 119 Cal.Rptr.2d 859 (2002). However, premeditation and deliberation can occur rapidly. "The test is not time, but reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." People v. Sanchez, 26 Cal.4th 834, 849, 111 Cal.Rptr.2d 129 (2001) (citation and internal quotations omitted). Further, to prove that a "killing was ‘deliberate and premeditated,’" it need not be shown that the killer "maturely and meaningfully reflected upon the gravity of his or her act." Cal. Penal Code § 189.

An "unlawful killing of a human being without malice" is manslaughter. Cal. Penal Code § 192. "A defendant lacks malice and is guilty of voluntary manslaughter in limited, explicitly defined circumstances: either when the defendant acts in a ‘sudden quarrel or heat of passion,’ or when the defendant kills in ‘unreasonable self-defense’ -- the unreasonable but good faith belief in having to act in self-defense." People v. Lasko, 23 Cal.4th 101, 108, 96 Cal.Rptr.2d 441 (2000) (internal citations and some internal quotations omitted); see Cal. Penal Code § 192(a). To establish that a homicide occurred during the heat of passion, it must be proven that the killer was sufficiently provoked. Id. at 108. Specifically, "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim." People v. Lee, 20 Cal.4th 47, 59, 82 Cal.Rptr.2d 625 (1999) (emphasis added) (internal citations omitted); People v. Manriquez, 37 Cal.4th 547, 583, 36 Cal.Rptr.3d 340 (2005). The test of adequate provocation is objective -- the provocation, whether physical or verbal, must be such that "it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." Manriquez, 37 Cal.4th at 584; Lee, 20 Cal.4th at 59.

To prove attempted murder, it must be established that a defendant took at least one direct but ineffective step toward killing a person and he intended to kill that person. (Cal. Penal Code §§ 664, 187(a); CALCRIM Nos. 600, 601).

1 In petitioner's case, the jury was instructed on the elements of attempted murder in the first
 2 degree (CALJIC Nos. 8.66, 8.67) and the elements of the lesser included offense of voluntary
 3 manslaughter, including the theories of "heat of passion" and self-defense (CALJIC Nos. 8.40,
 4 8.42, 8.43, 8.44, 8.50, 5.17, 5.30, 5.50, 5.51, 5.52, 5.55). (See RT 320-31, 341-44 ; CT 102-04,
 5 108-12, 127-33). The jury was also instructed pursuant to CALJIC Nos. 4.21.1 and 4.22 to
 6 consider whether, if there was evidence of intoxication, petitioner had the specific intent necessary
 7 for the attempted murder charge. (See RT 339-41; CT 125).

8 **B. The California Court of Appeal's Opinion**

9 Petitioner unsuccessfully raised this claim on appeal. In its determination that there was
 10 sufficient evidence of petitioner's intent to kill, the California Court of Appeal explained:

11 Rarely will the intent of a wrongdoer be proven by direct
 12 evidence for "[o]ne who intentionally attempts to kill another does not
 13 often declare his state of mind either before, at, or after the moment
 14 he shoots." (People v. Lashley (1991) 1 Cal.App.4th 938, 945.)
 15 Rather, circumstantial evidence will usually determine this issue. The
 16 evidentiary sufficiency of a finding of premeditation and deliberation
 17 requires review of, among other circumstantial factors, (1) facts about
 18 the defendant's conduct showing prior planning, (2) facts about the
 19 defendant's relationship with the victim from which motive can be
 20 inferred, and (3) facts about the manner of killing from which the jury
 21 could infer that the defendant intentionally wanted to kill the victim as
 22 part of a preconceived plan to do so in a particular way for a specific
 23 reason. (People v. Anderson (1968) 70 Cal.2d 15, 26-27.) There is
 24 ample evidence in the record before us that [petitioner] had the
 25 motivation to kill Mendez. [Petitioner] and Mendez had had an
 26 altercation, a short time before the shooting, in which Mendez had
 27 thrown a pitcher of beer on [petitioner], and according to [petitioner],
 28 hit him in the head and wrist, causing his hand to bleed. When
 [petitioner] left the bar, he warned Mendez that, "You'll be sorry." He
 broke three windows of Mendez's pickup truck as he was leaving the
 parking lot and stated, "I'll be back."

There is also evidence that [petitioner] planned to murder
 Mendez. Planning can be inferred from evidence that the defendant
 obtained a weapon and used it upon the victim. (See, e.g., People v.
Miller (1990) 50 Cal.3d 954, 993 [evidence that defendant kept a
 length of pipe in his car and used it as a weapon]; People v.
Belmontes (1988) 45 Cal.3d 744, 792 [defendant armed himself with
 an iron bar, followed the victim to his front door and struck him as
 hard as he could]; People v. Haskett (1982) 30 Cal.3d 841, 850
 [defendant obtained a weapon and parked outside the victim's home
 for several minutes before the attack]; People v. Francisco (1994) 22
 Cal.App.4th 1180, 1192 [defendant obtained a gun to shoot someone
 and drove around looking for someone to shoot].) Premeditation and
 deliberation do not require much time (People v. Hughes (2002) 27

Cal.4th 287, 371), for "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." (Ibid.) There was evidence here permitting an inference that [petitioner] left Joe's Place to obtain a gun and then returned, as he threatened he would, to kill Mendez. Upon his return, [petitioner] followed Mendez, caught up with him, removed a gun from a bag next to him on the front seat, chambered a round and shot four rounds into Mendez's truck, two bullets hitting the driver's cab area and bullet fragments imbedding in Mendez's forehead and neck.

The manner of the attempted killing here is also probative of [petitioner's] intention. Firing four bullets at Mendez's truck at very close range is a strong indicator of an intent to kill. (See, e.g., People v. Thomas (1992) 2 Cal.4th 489, 518; see also People v. Francisco, supra, 22 Cal.App.4th at p. 1192 [five or six shots from five feet away].) He had no provocation by the victim to do so. (See People v. Miller, supra, 50 Cal.3d at p. 993.) Certain acts of aggression, by their very nature, suggest an intent to kill. (See People v. Chinchilla (1997) 52 Cal.App.4th 683, 690; People v. Lashley, supra, 1 Cal.App.4th at p. 945 [shooting at point-blank range "undoubtedly creates a strong inference that the killing was intentional"].)

There was also sufficient evidence to support the jury's implied finding that [petitioner] was not too intoxicated to have formed the specific intent to kill Mendez. Just because [petitioner] was drinking, does not compel the conclusion that he was intoxicated. (People v. Miller (1962) 57 Cal.2d 821, 830-831 ["The mere fact that a defendant may have been drinking prior to the commission of a crime does not establish intoxication...."].) Even if there is evidence of intoxication, a jury could still have reasonably concluded that [petitioner] retained the capacity to intend to commit the crime. (See People v. Hernandez (1988) 47 Cal.3d 315, 346-347.)

While [petitioner] testified that he was intoxicated, having drunk 10 pitchers of beer between 9:00 a.m. and 5:00 p.m., and an undisclosed number of "shots" obtained from the nearby liquor store, there was evidence he exaggerated the amount he consumed. When asked how much he drank, [petitioner] initially testified that he drank a pitcher every one to two hours. If it was only every two hours, he only drank four or five pitchers during the course of the entire day. One of the pitchers, nearly three-quarters full, was spilled on him by Mendez. None of the other patrons who were asked saw him bring shots back to the bar from the liquor store, as he claimed.

Moreover, [petitioner's] behavior suggested that whatever quantity he drank, it did not significantly impair him. He was able to play pool, hold the pool cue, walk with a normal gait, speak without slurring, remove the "Club" from his steering wheel and use it to break Mendez's windows, drive his pickup truck, obtain his gun from a bag while driving and, with one hand, chamber a round and fire four shots at Mendez's vehicle. He also had a clear recollection of the events.

This evidence was sufficient to support the jury's guilty verdict.

Martinez, 2005 WL 2995528, at *4-5.

1 **C. Analysis of Petitioner's Claim**

2 In a federal habeas proceeding, a habeas petitioner challenging the sufficiency of the
 3 evidence may obtain relief only if "it is found that upon the record evidence adduced at the trial
 4 no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v.
 5 Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[T]he relevant question is
 6 whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier
 7 of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at
 8 319 (emphasis in original); see also Schell v. Witek, 218 F.3d 1017, 1023 (9th Cir. 2000). If the
 9 record supports conflicting inferences, the Court "must presume -- even if it does not affirmatively
 10 appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution,
 11 and must defer to that resolution." Jackson, 443 U.S. at 326; see also Wright v. West, 505 U.S.
 12 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (plurality opinion); Schell, 218 F.3d at 1023.
 13 The reviewing habeas court must respect the exclusive province of the fact finder to resolve
 14 evidentiary conflicts and draw reasonable inferences from proven facts. See United States v.
 15 Goode, 814 F.2d 1353, 1355 (9th Cir. 1987). Moreover, this Court applies an additional layer of
 16 deference under AEDPA on federal habeas review of an insufficient evidence claim: habeas relief
 17 is not warranted unless "the state court's application of the Jackson standard [was] 'objectively
 18 unreasonable.'" Juan H. v. Allen, 408 F.3d 1262, 1274, 1275 n.13 (9th Cir. 2005) (as amended),
 19 cert. denied, 546 U.S. 1137 (2006).

20 Here, after viewing the evidence presented at trial in the light most favorable to the
 21 prosecution, and presuming that the trier of fact resolved all conflicting inferences from the
 22 evidence against petitioner, the Court finds that a rational trier of fact could reasonably have found
 23 beyond a reasonable doubt that petitioner had the requisite intent to commit murder. See
 24 Jackson, 443 U.S. at 325-26. The record shows that, shortly before the shooting, petitioner and
 25 Mendez had an argument, in which Mendez threw a pitcher of beer at petitioner. When petitioner
 26 left the bar he warned Mendez, "You'll be sorry." (RT 65, 112). After petitioner broke three
 27 windows in Mendez's truck, he warned, "I'll be back" before driving away. (RT 90-93). Petitioner
 28 then drove back to Joe's Place and proceeded to follow Mendez as he left in his truck. While at

1 close range, petitioner removed a gun from his bag and fired four shots at Mendez's truck, with
 2 two bullets hitting the driver's area and bullet fragments hitting Mendez's forehead and neck.
 3 From this evidence, a rational juror could reasonably conclude that petitioner had the motivation
 4 to kill Mendez and planned to do so as it could be reasonably inferred from the sequence of
 5 events that, after the initial altercation with Mendez, petitioner left the bar to obtain his gun and
 6 then returned to confront Mendez. Even if the jury believed that petitioner had the gun in his truck
 7 throughout the incident, petitioner nevertheless drove away from the bar and then drove back to
 8 confront Mendez -- actions from which it could be inferred that petitioner had time to deliberate
 9 and plan. Moreover, as the California Court of Appeal observed, the fact that petitioner fired four
 10 bullets at close range at Mendez's truck further indicated an intent to kill. The jury was instructed
 11 on the issue of intoxication (see RT 339-41; CT 125), but evidently found that petitioner was not
 12 so intoxicated that he did not have the requisite intent to kill. To the extent the jury made
 13 credibility determinations in reaching this conclusion, those determinations will not be disturbed
 14 in this habeas review. Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (a jury's credibility
 15 determinations are entitled to "near-total deference under Jackson").¹

16 In any event, when viewing the evidence in the light most favorable to the prosecution,
 17 petitioner's actions did not indicate that he was significantly impaired. As the state appellate court
 18 found, petitioner was able to play pool, walk normally, speak without slurring, remove the car club
 19 from his steering wheel and then use it to break Mendez's windows, drive his truck (apparently
 20 without difficulty), remove his gun from a bag while driving, and then fire four shots at Mendez's
 21 truck. (RT 86, 148-49, 154, 271, 285-86). Petitioner also testified regarding the events of the
 22 evening and did not indicate that he had any difficulty recalling what had occurred. (RT 235-62).

24 ¹ To the extent petitioner argues that the evidence was insufficient to support the
 25 attempted murder charge because he acted in self-defense after Mendez pointed a gun at him,
 26 this claim fails. The jury was thoroughly instructed on the theory of self-defense and imperfect
 27 self-defense. (See RT 341-44; CT 127-33). In reaching its verdict the jury apparently made a
 28 credibility determination in the prosecution's favor and rejected the self-defense theory. Again,
 the jury's credibility determinations will not be disturbed here. Bruce, 376 F.3d at 957. For the
 reasons explained above, there was ample evidence showing that petitioner had the requisite
 intent to kill.

Moreover, petitioner testified that after he initially drove away from the bar to treat his injury, he then drove back to obtain Mendez's license plate number. He also testified that he shot Mendez because Mendez waved a gun at him, and not because he was intoxicated. On this record, a rational juror could reasonably conclude that, if petitioner were intoxicated, he was not impaired in such a way that he was incapable of having the specific intent necessary for the attempted murder charge.

For these reasons, the Court concludes that the California Court of Appeal's reasoned denial of petitioner's insufficiency of the evidence claim was not an objectively unreasonable application of the Jackson standard. Habeas relief is not warranted for Ground One. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 411-12.

GROUND TWO: THE TRIAL COURT IMPROPERLY LIMITED PETITIONER'S TESTIMONY.

In Ground Two, petitioner asserts that the trial court improperly limited his testimony concerning why he was carrying a firearm at the time of the incident and thus violated his constitutional rights to due process and to present a defense. (Am. Pet., Attachment of Grounds, Op. Brief at 20-27).

A. Summary of Relevant Facts

In its opinion rejecting petitioner's direct appeal, the California Court of Appeal provided the following factual summary relevant to this claim:

Before trial began, the prosecutor moved to exclude evidence that [petitioner] was an animal control regulation officer and pictures of [petitioner] wearing his badge, because "animals are just a loaded kind of thing." The trial court deferred considering this issue until it arose during trial.

During [petitioner's] testimony, at a sidebar conference, defense counsel made an offer of proof that [petitioner] was going to testify that he was an animal control officer, working a dangerous job with dangerous animals, in remote locations, late at night, and carried a gun for self-protection. He argued that this evidence was relevant to explain why he had a gun and to negate the prosecution's evidence of premeditation and specific intent.

The prosecutor conceded that [petitioner] could testify that he carried a gun because he worked the graveyard shift, but did not "think the jury needs to know he's . . . [an] animal control officer."

1 Upon inquiry by the trial court, [petitioner's] counsel stated that he did
 2 not believe [petitioner] could testify that his employer allowed him to
 3 carry a weapon when he worked graveyard. He just carries it for "his
 4 own kind of thing."

5 Consequently, the trial court ruled that the nature of
 6 [petitioner's] job and a fuller explanation of why he carried a firearm
 7 at work were not relevant, as there was no evidence he was required
 8 to carry a gun for his job. [Petitioner] was permitted to, and did, testify
 9 that he worked from midnight until 8:00 a.m., that when he shot
 10 Mendez his gun was in a backpack in his truck because he worked in
 11 a secluded area, his "job had been recently burglarized," and he kept
 12 the gun to protect himself.

13 Martinez, 2005 WL 2995528, at *6.

14 **B. The California Court of Appeal's Decision**

15 On direct appeal, the California Court of Appeal concluded:

16 We review a trial court's admission of evidence as against a
 17 relevance objection under the deferential abuse of discretion
 18 standard. (People v. Brown (2003) 31 Cal.4th 518, 577.) "Except as
 19 otherwise provided by statute, all relevant evidence is admissible."
 20 ([Cal.] Evid. Code, § 351.) Relevant evidence is evidence "having any
 21 tendency in reason to prove or disprove any disputed fact that is of
 22 consequence to the determination of the action." ([Cal.] Evid. Code,
 23 § 210.) We cannot say that the trial court abused its discretion in
 24 excluding the additional evidence that [petitioner] worked for the
 25 animal control department.

26 There was evidence from which an inference could be drawn
 27 that after his altercation with Mendez in the bar, [petitioner] went
 28 home or elsewhere to retrieve a gun. This, in turn, permitted an
 inference that [petitioner] planned and premeditated the killing of
 Mendez. Evidence that [petitioner] carried a gun with him was
 relevant to rebut this inference and to suggest that the shooting was
 a spontaneous, unplanned occurrence. But [petitioner] was permitted
 to introduce this evidence. The details of his employment were
 irrelevant, particularly because he was not required to carry the gun
 as part of his job.

Even if the trial court erred in refusing to allow the additional
 evidence [petitioner] sought to introduce, the error was harmless in
 that it is not reasonably probable that had it been admitted [petitioner]
 would have obtained a more favorable result. (People v. Watson
 (1956) 46 Cal.2d 818, 836.) The evidence that [petitioner] intended to
 kill Mendez was strong. He threatened that Mendez would be sorry for
 having thrown beer on him, left the bar and returned, followed
 Mendez in his car, loaded his gun and fired at him through the car
 window at close range. Further, [petitioner] was permitted to testify
 that he carried his gun with him in his truck because he worked the
 night shift, the core of the evidence he sought to introduce to rebut
 the challenged inference of premeditation.

1 Martinez, 2005 WL 2995528, at *7-8.

2 **C. Analysis of Petitioner's Claim**

3 "[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present
4 a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636
5 (1986) (citation omitted). "[T]he erroneous exclusion of critical, corroborative defense evidence
6 may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment
7 right to present a defense." DePetrus v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing
8 Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). The Ninth
9 Circuit has held that the following factors must be weighed to determine whether the exclusion of
10 evidence reaches constitutional proportions: "(1) the probative value of the excluded evidence on
11 the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4)
12 whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes
13 a major part of the attempted defense." Chia v. Cambra, 360 F.3d 997, 1004 (9th Cir. 2004).

14 After balancing these five factors, the Court concludes that the exclusion of evidence
15 concerning petitioner's job title did not violate petitioner's constitutional rights. Evidence
16 concerning whether the gun was in petitioner's possession at the time of the altercation with
17 Mendez was relevant to the determination of whether the shooting was spontaneous and
18 unplanned as petitioner argued. At trial, petitioner testified that his work shift lasted from midnight
19 until 8:00 a.m., that when he shot Mendez his gun was in a backpack in his truck because he
20 worked in a secluded area, that his job had been recently burglarized, and that he carried the gun
21 to protect himself. He was only prohibited from testifying regarding the nature of his job as an
22 animal control officer. (RT 252, 255-60). The relevance of the excluded evidence on the issue
23 of whether petitioner planned and premeditated the shooting, however, was minimal -- especially
24 considering that petitioner was allowed to state the primary reason he carried the gun, i.e., for
25 self-protection given the dangers of his job. In light of its meager relevance, it cannot be said that
26 the information concerning petitioner's employment details was a major part of petitioner's
27 defense. Under these circumstances, the Court is persuaded that even assuming the evidence
28 was reliable and not cumulative, and that it was capable of being evaluated by the jury, those

1 factors are outweighed by the lack of probative value coupled with the minuscule role the
 2 excluded evidence played in petitioner's case. Accordingly, the exclusion was not unconstitutional
 3 and, in turn, petitioner's right to present a defense was not violated.

4 In any event, even if the exclusion were in error, habeas relief can be granted only if the
 5 erroneous exclusion had a "substantial and injurious effect" on the verdict. Brecht v. Abrahamson,
 6 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). In light of the prosecution's evidence
 7 from which it can be inferred that petitioner planned the shooting, see supra, petitioner has not
 8 demonstrated Brecht error. In short, there is no reasonable probability that, had petitioner testified
 9 in greater detail regarding the nature of his job, the jury would have decided the case differently.

10 For these reasons, the state court's denial of this claim was not an unreasonable
 11 application of, or contrary to, clearly established United States Supreme Court precedent. Habeas
 12 relief is denied for Ground Two. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 411-12.

14 **GROUND THREE: PETITIONER'S RIGHTS TO AN IMPARTIAL JURY AND DUE PROCESS** 15 **WERE VIOLATED.**

16 Petitioner asserts in Ground Three that the trial court, by failing to question the jury
 17 foreperson after learning that the foreperson knew petitioner, erred in violation of petitioner's rights
 18 to due process and to an impartial jury. (Am. Pet., Attachment of Grounds, Op. Brief at 28-35).

19 **A. Summary of Relevant Facts**

20 On May 17, 2004, at the beginning of voir dire, after the prospective jurors swore to
 21 accurately and truthfully answer the questions that were going to be asked of them under penalty
 22 of perjury, the trial court introduced petitioner and both counsel to the prospective jurors and
 23 asked: "Is there anybody out in the audience that recognizes any of the three folks I just
 24 introduced to you?" None of the jurors indicated that they recognized them. (RT 14-15, 18-20).

25 On May 25, 2004, the jury rendered its verdict, finding petitioner guilty as charged. At the
 26 sentencing hearing nearly a month later, petitioner's counsel advised the trial court that petitioner
 27 knew the jury foreman. He stated: "Just put one brief matter on the record we discussed in
 28 chambers, and that is my client informed me after the verdict in this case that he knew one of the

jurors that actually was a juror on this case that was the foreperson of the jury. I discussed that with him, and at this point I don't have anywhere to go as far as following up on that statement by my client. My client told me today that he would like to proceed with the sentencing regardless of that information he provided me with, so that's what I intend to do." (RT 419-20). Upon hearing this, the trial court did not summon the juror for questioning, but only asked defense counsel when it was that petitioner revealed this information. Defense counsel responded that it was after the verdict in the case and after the jury had been polled. (RT 419-20).

B. The California Court of Appeal's Decision

On direct appeal, the California Court of Appeal found that although petitioner had waived the claim, it still failed on the merits, stating:

Even if the claim had not been waived, we would nonetheless reject it on the merits. A juror cannot decide a case based on personal knowledge of facts related to the specific matter. (See People v. Cumpian (1991) 1 Cal.App.4th 307, 313 [juror resort to extrinsic evidence is basis for a misconduct finding].) A juror also commits misconduct by violating his or her oath or by failing to follow the trial court's instructions or admonitions. (In re Hamilton, *supra*, 20 Cal.4th at p. 305.) If there was evidence that the jury foreperson knew personal facts about [petitioner] that bore on this case or lied when the foreperson testified that he did not know [petitioner], a case of misconduct might have been established. The question is whether sufficient facts of such misconduct existed to warrant the trial court making further inquiry.

A trial judge "must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'" (People v. Davis (1995) 10 Cal.4th 463, 547; People v. Bradford (1997) 15 Cal.4th 1229, 1348; People v. Williams, *supra*, 16 Cal.4th at p. 230.) In order to justify investigation, there must be more than mere speculation of juror misconduct. The juror's inability to perform must appear as a "demonstrable reality." (*Id.* at p. 231.) Both the decision to investigate and the decision as to whether there was misconduct justifying discharge rest in the trial court's sound discretion. (People v. Bradford, *supra*, at p. 1347.) In order to believe a juror will be unable to fulfill his or her function as a juror, the misconduct must be serious and willful. (People v. Bowers (2001) 87 Cal.App.4th 722, 729.)

The trial court did not abuse its discretion in failing to conduct further investigation into juror misconduct here. The issue was raised a month after the verdict was entered and the jury was discharged. [Petitioner's] counsel reported to the trial court that [petitioner] knew the jury foreperson. *He did not say that the juror knew [petitioner]*. He also did not say how [petitioner] knew the juror, which might have

provided insight into whether the juror also knew [petitioner], or if the juror remembered [petitioner], if he ever knew him. It would have been rampant speculation, at best, to suspect that there was juror misconduct based on the delayed, meager information provided by [petitioner].

Martinez, 2005 WL 2995528, at *9 (emphasis in original).

C. Analysis of Petitioner's Claim

A criminal defendant has a Sixth Amendment right to a verdict by impartial jurors. Turner v. Louisiana, 379 U.S. 466, 471-72, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Green v. White, 232 F.3d 671, 676 (9th Cir. 2000); Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998). "If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977); Dyer, 151 F.3d at 973. Moreover, a defendant is entitled to a jury that "reaches a verdict on the basis of evidence produced at trial, exclusive of 'extrinsic evidence.'" Grotemeyer v. Hickman, 393 F.3d 871, 877 (9th Cir. 2004). In other words, "[j]urors have a duty to consider only the evidence which is presented to them in open court." Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986); see also United States v. Navarro-Garcia, 926 F.2d 818, 821-22 (9th Cir. 1991) (noting that "a juror's personal experiences may constitute extrinsic evidence" in some instances).

"Clearly established federal law, as determined by the Supreme Court, does not require state or federal courts to hold a hearing every time a claim of juror bias is raised." Tracey v. Palmateer, 341 F.3d 1037, 1045 (9th Cir. 2003); see also United States v. Hanley, 190 F.3d 1017, 1031 (9th Cir. 1999) (evidentiary hearing not required every time a defendant alleges juror misconduct or bias). Generally, a hearing is justified only when the evidence showing juror misconduct or bias is sufficient on its face to require setting aside the verdict. See Hard v. Burlington Northern R.R. Co., 870 F.2d 1454, 1461 (9th Cir. 1989); see also United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986) ("While we recognize that where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing . . . not every allegation [of misconduct] requires a full-dress hearing"). Moreover, when the trial court is aware of the exact scope and nature of the alleged misconduct, a hearing is not necessarily

1 required to explore the matter further. See United States v. Halbert, 712 F.2d 388, 389 (9th Cir.
2 1983).

3 In this case, the Court finds that petitioner's assertion of jury bias or misconduct is based
4 on speculation, and under these circumstances, it was not error for the trial court to not conduct
5 a hearing on the matter. Although petitioner claims that he knew the jury foreperson, there was
6 no indication that the juror foreperson knew or even recognized petitioner. As the record shows,
7 at voire dire, after the jury had been sworn to tell the truth, the trial court asked the jury panel if
8 anyone recognized petitioner, and no juror responded affirmatively. Moreover, petitioner failed
9 to bring this issue to his counsel's or the trial court's attention until after the verdict was reached.
10 It appears that if petitioner were concerned about his connection with the foreperson and possible
11 juror bias, he would have raised the issue with his counsel at some point during voir dire, during
12 the trial, or at some point prior to deliberations. As the California Court of Appeal determined, it
13 "would have been rampant speculation, at best, to suspect that there was juror misconduct based
14 on the delayed, meager information provided." Martinez, 2005 WL 2995528, at *9. In any event,
15 the record gives no indication that the foreperson was unable to decide the case solely on the
16 evidence before the jury. Nor is there any indication that other jurors were biased against
17 petitioner such that deliberations were not impartial. Moreover, the Court notes that the jury was
18 instructed to base its verdict on "the evidence received in the trial and not from any other source."
19 (RT 307; CT 80). Absent any evidence to the contrary, the Court presumes that each juror
20 followed this instruction and, in reaching the verdicts, did not consider any extraneous matters that
21 would have affected his or her impartiality. See Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct.
22 727, 145 L.Ed.2d 727 (2000).

23 For these reasons, the Court concludes that petitioner failed to demonstrate that his right
24 to an impartial jury was violated. The state court's denial of this claim was therefore not an
25 unreasonable application of, or contrary to, clearly established United States Supreme Court
26 precedent. Habeas relief is denied for Ground Three. 28 U.S.C. § 2254(d); Williams, 529 U.S.
27 at 411-12.

28 /

GROUND FOUR: PETITIONER'S TRIAL COUNSEL WAS INEFFECTIVE.

In Ground Four, petitioner contends that his trial counsel was ineffective for failing to inform the trial court in a timely manner that the foreperson knew petitioner, and for failing to take any other action to protect petitioner's right to a fair trial. (Am. Pet., Attachment of Grounds, Op. Brief. at 36-40).

A. The California Court of Appeal's Decision

In its opinion denying petitioner's appeal, the California Court of Appeal rejected this claim as follows:

The record before us is insufficient to allow us to conclude that there is a reasonable probability that but for counsel's delay in notifying the trial court that [petitioner] knew a juror, or counsel's failure to request further investigation of that issue, a different result would have ensued. . . . [T]here is no evidence of how or when [petitioner] knew the juror, or if the juror knew [petitioner]. The record also fails to indicate precisely when [petitioner] told his attorney that he knew the jury foreperson. While it suggests that it was after the jury verdict and the jury was polled, it is unclear if it was before or after the jury was discharged. [Footnote.] The record is also barren of any indication why [petitioner] delayed communicating the information to his attorney until after the jury returned.

[Petitioner] lost this claim by virtue of his own indolence in presenting it to his counsel and his instruction to his attorney not to delay sentencing to press the issue, not by any acts or omissions by his attorney. (See People v. Kirkpatrick (1994) 7 Cal.4th 988, 1013 ["a defendant who insists that mitigating evidence not be presented at the penalty phase is estopped from later claiming ineffective assistance based on counsel's acquiescence in his [or her] wishes"].)

Martinez, 2005 WL 2995528, at *10.

B. Petitioner's Claim of Ineffective Assistance

In federal habeas proceedings, the two-step analysis outlined by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), governs ineffective assistance claims. Under Strickland, petitioner first must prove that his attorney's representation fell below an objective standard of reasonableness by identifying the acts or omissions that rendered the representation objectively unreasonable. Id. at 687-88, 690. An attorney's performance is deemed deficient if it is objectively unreasonable under prevailing professional norms. Strickland, 466 U.S. at 687-88; Hughes v. Borg, 898 F.2d 695, 702 (9th Cir.

1 1990). Review of counsel's performance is highly deferential, and the petitioner must overcome
2 the strong presumption that counsel's conduct fell within the wide range of reasonable
3 representation. Strickland, 466 U.S. at 689. The reviewing court need not determine the actual
4 reason for an attorney's actions, as long as the act falls within the range of reasonable
5 representation. See Morris v. California, 966 F.2d 448, 456-57 (9th Cir. 1991). In reviewing a
6 challenge to the effectiveness of trial counsel, the court must make "every effort . . . to eliminate
7 the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged
8 conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S.
9 at 689.

10 In the second step, petitioner must show that he was prejudiced by counsel's deficient
11 performance by demonstrating a reasonable probability that, but for his counsel's errors, the result
12 of the proceeding would have been different. Strickland, 466 U.S. at 692, 694. "A reasonable
13 probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.
14 Petitioner bears the burden of satisfying both prongs of Strickland. Id. at 687; United States v.
15 Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995).

16 Here, the Court concludes that petitioner's ineffective assistance claim premised on trial
17 counsel's alleged failure to notify the trial court in a timely matter regarding petitioner's knowledge
18 of the jury foreperson lacks merit because petitioner has shown no prejudice within the meaning
19 of Strickland. See Strickland, 466 U.S. at 694. Again, although petitioner claims that he knew the
20 foreperson, the record shows that, based on the voir dire questions, the jury foreperson did not
21 know or even recognize petitioner. Based on this scant evidence of bias or misconduct, and given
22 the fact that petitioner waited until after the verdict was decided to raise the issue,² there is no
23 reasonable likelihood that had a hearing been held by the trial court to inquire further into
24

25 ² After petitioner informed defense counsel subsequent to the verdict being reached
26 that he knew the foreperson, defense counsel notified the trial court of this issue at the next court
27 proceeding. Moreover, although the trial court was notified, defense counsel stated that petitioner
28 wanted to proceed with sentencing "regardless of that information [regarding the foreperson]." (RT 419-20). The record gives no indication that petitioner objected to proceeding with the sentencing, or otherwise indicated that he wanted to delay sentencing, on account of his alleged relationship with the jury foreperson.

petitioner's alleged relationship with the jury foreperson, that a new trial would have been ordered. Thus, the Court finds that petitioner's claim of prejudice under Strickland is too speculative to warrant relief. See Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation . . . is not enough to establish prejudice.").

For these reasons, the state court's denial of this claim was not an unreasonable application of, or contrary to, clearly established United States Supreme Court precedent. Habeas relief is denied for Ground Four. 28 U.S.C. § 2254(d); Williams, 529 U.S. at 411-12.

GROUND FIVE: THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY WITH CALJIC NO. 5.55.

In Ground Five, petitioner asserts that the trial court erred in giving CALJIC No. 5.55, which provides: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity to exercise self-defense." (RT 343-44; CT 132).

According to petitioner, "[he] did not initiate a quarrel within the meaning of that instruction" and "[t]he instruction erroneously deprived [him] of the right of self-defense because he was not an initial aggressor who used deadly force and was met with deadly force by his pursuers." (Op. Brief at 41). He argues that the instruction is based on the principle that one "cannot commence a conflict with someone and then use a contrived plea of self-defense in order to retroactively justify what was essentially an unprovoked criminal assault." (Op. Brief at 42). Petitioner asserts that the principle has no application to his case because "neither [his] verbal altercation with Mendez, nor his breaking Mendez's truck windows outside Mendez's presence constituted an act that warranted Mendez to act in self defense." (Id.). According to petitioner, CALJIC No. 5.55 is therefore an incorrect statement of the law as applied to this case. (Id.).

A. The California Court of Appeal's Opinion

On direct appeal, the California Court of Appeal rejected petitioner's claim concerning the instructions on the limitations of self-defense as follows:

"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The

1 general principles of law governing the case are those principles
 2 closely and openly connected with the facts before the court, and
 3 which are necessary for the jury's understanding of the case.
 4 [Citations.]” (People v. Edwards (1985) 39 Cal.3d 107, 117.) CALJIC
 5 No. 5.55 articulates the general principle of law that a defendant
 6 cannot commence a dispute with a person and use that person's
 7 response as a contrived justification for a plea of self-defense. (See
 8 People v. Hinshaw (1924) 194 Cal. 1, 26.) It was therefore properly
 9 given, if there was evidence to support it.

10 The defense of self-defense is not lost if the person who is the
 11 initial aggressor uses force that does not justify a deadly response.
 12 That person may use deadly force in response to the unjustified
 13 deadly response by the other person. (See People v. Hardin (2000)
 14 85 Cal.App.4th 625, 630-631.) A minor wrongdoer met with a deadly
 15 and unjustified counter attack does not lose his right to self-defense.
 16 (People v. Hecker (1895) 109 Cal. 451, 464.) However, if the initial
 17 wrongdoer engaged in conduct that would make the victim reasonably
 18 believe that his or her life is in imminent peril legally justifying the
 19 victim's use of deadly force, although the initial attack did not, then the
 20 right of self-defense is lost. (See People v. Hardin, supra, at p. 630
 21 [“It is well established that the ordinary self-defense doctrine --
 22 applicable when a defendant reasonably believes that his safety is
 23 endangered -- may not be invoked by a defendant who, through his
 24 own wrongful conduct (e.g., the initiation of a physical assault or the
 25 commission of a felony), has created circumstances under which his
 26 adversary's attack or pursuit is legally justified”].)

27 There was evidence here permitting an inference that Mendez
 28 reasonably believed his life was in imminent peril when he purportedly
 29 waved a gun at [petitioner]. [Petitioner] left the bar threatening that
 30 Mendez would “be sorry,” and that he would be back. He then used
 31 the “Club” to break three windows of Mendez's truck, with little
 32 concern to the criminal nature of his conduct or that there was a
 33 witness to it. He left Joe's Place, returned and followed Mendez's
 34 truck closely, racing his engine. These circumstances justified
 35 Mendez's fear of a deadly attack and his threat to make a deadly
 36 response.

37 Even assuming for the sake of argument that the trial court
 38 erred in giving this instruction, we would find any error to be harmless,
 39 as there was no reasonable probability (or even possibility) that
 40 [petitioner] would have received a more favorable verdict if CALJIC
 41 No. 5.55 had not been given. (People v. Watson, supra, 46 Cal.2d at
 42 p. 836.) Assuming this instruction was unwarranted by the evidence,
 43 giving it is usually held harmless error. (See People v. Garnier (1950)
 44 95 Cal.App.2d 489, 496-497; see also People v. Olguin (1994) 31
 45 Cal.App.4th 1355, 1381; People v. Crandell (1988) 46 Cal.3d 833,
 46 872.) Here, the evidence against [petitioner] was strong. He admitted
 47 shooting at Mendez's vehicle, and gave a story that was incredulous
 48 in several respects. In addition to CALJIC Nos. 5.50 and 5.55, the
 49 trial court instructed the jury with a series of CALJIC self-defense
 50 instructions: 5.17 (actual but unreasonable belief in necessity to
 51 defend); 5.30 (self-defense against assault), 5.51 (self-defense-actual
 52 danger not necessary) and 5.52 (self-defense-when danger ceases).

1 It has been considered harmless to give CALJIC No. 5.55, even when
 2 unsupported by the evidence, where, as here, a series of self-defense
 3 instructions are given, some applicable and some not, depending
 4 upon the jury's factual findings, and the jury has also been given
 5 CALJIC No. 17.31, instructing the jury, "Disregard any instruction
 6 which applies to facts determined by you not to exist. Do not conclude
 7 that because an instruction has been given I am expressing an
 8 opinion as to the facts." (*People v. Olguin*, *supra*, at p. 1381.) We
 9 cannot assume, as [petitioner] suggests, that the jury disregarded that
 10 instruction and chose instead to follow an irrelevant instruction. (See
 11 *People v. Guiton* (1993) 4 Cal.4th 1116, 1127; *People v. Crandell*,
 12 *supra*, at p. 872.)

13 *Martinez*, 2005 WL 2995528, at *11-12.

14 **B. Federal Law Regarding Instructional Error**

15 To obtain habeas relief, petitioner must show that the alleged instructional error so infected
 16 the entire trial that the resulting conviction violated due process. *Estelle v. McGuire*, 502 U.S. 62,
 17 71-72, 112 S.Ct. 475, 116 L.Ed.2d 385; *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730,
 18 1736, 52 L.Ed.2d 203 (1977). "[I]t must be established not merely that the instruction is
 19 undesirable, erroneous or even 'universally condemned,' but that it violated some right which was
 20 guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141,
 21 146, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). The reviewing court must not view the instruction
 22 in isolation, but should consider it in the context of the trial record and the instructions as a whole.
 23 *Estelle*, 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context of
 24 the overall charge to the jury as a component of the entire trial process. *United States v. Frady*,
 25 456 U.S. 152, 169, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982).

26 Even if there is some ambiguity in an instruction, that alone does not amount to a due
 27 process violation. See *Waddington v. Sarausad*, ___ U.S. ___, 129 S.Ct. 823, 831, 172 L.Ed.2d 532
 28 (2009). Rather, in the event of an ambiguity, the habeas court must inquire whether there was
 a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates
 the United States Constitution. *Estelle*, 502 U.S. at 72 & n. 4; *Boyde v. California*, 494 U.S. 370,
 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

Here, petitioner's instructional error argument lacks merit as he has failed to establish any
 due process violation. As the California Court of Appeal concluded, even if the jury believed

1 petitioner's allegation that Mendez waved a gun at him while they were driving, it could be inferred
2 from the evidence involving the altercation between petitioner and Mendez that Mendez at that
3 time reasonably believed that his life was in danger. Specifically, the record shows that petitioner
4 verbally threatened Mendez while inside the bar, told Mendez "you'll be sorry," broke windows in
5 Mendez's truck, and then followed Mendez as Mendez drove away from the bar. Based on this
6 evidence, it could be determined that Mendez was justified in fearing a deadly attack and in
7 making a threat of deadly force in response. Thus, because there was evidence to support the
8 giving of CALJIC No. 5.55, petitioner has not demonstrated any due process violation.

9 In any event, even assuming the trial court erred in giving CALJIC No. 5.55, the result was
10 harmless because the record does not show that it had a substantial and injurious effect or
11 influence on the verdict. Brecht, 507 U.S. at 623. First, as discussed supra, the evidence
12 showing that petitioner committed attempted murder was substantial. There is no reasonable
13 likelihood that, had the instruction been omitted, the verdict would have been any different.
14 Moreover, to the extent CALJIC No. 5.55 was not applicable in the case, the Court notes that the
15 jury was also instructed: "Whether some instructions apply will depend upon what you find to be
16 the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not
17 conclude that because an instruction has been given [the court] is expressing an opinion as to the
18 facts." (RT 344). The Court presumes that the jury understood and followed this instruction, and
19 in turn, disregarded any instructions that were factually inapplicable. See Weeks, 528 U.S. at
20 234.

21 For these reasons, the California Court of Appeal's determination rejecting petitioner's
22 claim of instructional error was not contrary to, nor did it involve an unreasonable application of,
23 clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. §
24 2254(d); Williams, 529 U.S. at 411-12. Habeas relief is denied for Ground Five.

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VI.

RECOMMENDATION

It is recommended that the District Court issue an Order: (1) adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Amended Petition and dismissing this action with prejudice.

This Report and Recommendation is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.

DATED: April 20, 2010



PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.